INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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August 13, 1998

M. Christine Alichnie, Ph.D., R.N., Chairperson
State Board of Nursing
116 Pine Street
Harrisburg, PA 17105

Re: IRRC Regulation #16A-5110 (#1952)
State Board of Nursing
Sexual Misconduct

Dear Chairperson Alichnie:

Enclosed are our comments on your proposed regulation #16A-5110. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact Chuck Tyrrell at 772-3455 or Kimberly Trammell de Bien at 783-6834. They have been assigned to review this regulation.

Sincerely,

Robert E. Nyce
Executive Director

REN:kcg
Enclosure
cc: Herbert Abramson
Joyce McKeever
Kim Pizzingrilli
Dorothy Childress
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

STATE BOARD OF NURSING NO. 16A-5110

SEXUAL MISCONDUCT

AUGUST 13, 1998

We have reviewed this proposed regulation from the State Board of Nursing (Board) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, need, reasonableness and clarity of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 21.1. Definitions. - Statutory Authority and Clarity

Behavioral/mental health nurse therapist

It appears the proposed definition of "behavioral/mental health nurse therapist" is beyond the Board's statutory authority because it conflicts with the definition of "Practice of Professional Nursing" found in the Professional Nursing Law (Act) (63 P.S. § 212(1)).

As proposed, the term "behavioral/mental health nurse therapist" is defined as a registered nurse engaged in a specialized practice involving **assessment, diagnosis, counseling or treatment, including psychotherapy, of any mental or emotional problem, impairment, dysfunction or illness** (emphasis added).

The statutory definition provides that professional nursing "shall not be deemed to include acts of medical diagnosis or prescription of medical therapeutic or corrective measures...." However, the proposed definition of "behavioral/mental health nurse therapist" would allow a nurse to diagnose and treat a patient.

Furthermore, the statutory definition of "practice of professional nursing," provides that a nurse may execute "medical regimens as prescribed by a licensed physician." The proposed definition of "behavioral/mental health nurse therapist" would authorize a nurse to unilaterally prescribe medical or treatment regimens, and to carry them out without any direction or oversight by a licensed physician.

Therefore, we object to the Board's proposed definition of "behavioral/mental health nurse therapist" and recommend it be deleted from the final-form regulation. However, we do not object to the Board's intent to establish different standards for nurses providing services in the mental health field from nurses providing services in other health care fields. As discussed below, we believe that the distinction should be made in the definition of "professional relationship."

Professional relationship

Subsection (i)

Subsection (i) of the definition of "professional relationship" should be revised to provide more clarity. First, the definition provides that the end of the professional relationship occurs "with the patient's discharge from or *discontinuance of services by the nurse or by the nurse's employer*." We question how this provision applies when an individual returns to the nurse's employer for treatment which is not related to the treatment provided by the nurse. Therefore, we request the Board clarify its intent for this situation.

Second, Subsection (i) should be written to avoid the negative "except" in relating to registered nurses not involved in mental health services. This subsection could begin by providing, "For a registered nurse not involved in providing mental health services, the relationship shall be deemed...."

Finally, the Board also uses the term "except" when discussing the provision of emergency medical care. We recommend that the Board revise the last portion of Subsection (i) to read as follows: "Administration of necessary emergency medical treatment or transitory trauma care shall not constitute a professional relationship."

Subsection (ii)

We agree that the Board should provide different standards for nurses providing services in the mental health field from nurses providing services in other health care fields. However, this distinction should be made in the definition of "professional relationship," and not by adopting the separate definition of "behavioral/mental health nurse therapist." To do this, Subsection (ii) could be revised as follows:

> (ii) For a registered nurse involved in the practice of professional nursing in the mental health care field, the professional relationship shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a registered nurse and patient and ending 2 years after discharge from or discontinuance of services. For a minor, a professional relationship shall be deemed to exist for 2 years or until 1 year after the age of majority, whichever is longer, after discharge from or discontinuance of services.

2. Sections 21.18 and 21.148. Standards of nursing conduct. – Clarity

Subsection (d) in both Sections 21.18 and 21.148 provides that the Board may levy appropriate civil penalties "as authorized by law." To improve the clarity of the regulation, the Board should provide specific cites to the relevant statutes authorizing the civil penalties in these sections.

3. Sections 21.18a and 21.148a. Post-adjudication reporting. – Need and Reasonableness

The regulation provides that as a condition of reinstatement, the Board may require the nurse to obtain prior, written, informed consent of the patients to be treated by the nurse. Prior to treatment, the patient would sign a consent form that indicates that the nurse had a previous violation. We have two concerns with this provision.

First, we question the circumstances under which the Board may exercise its discretion and require the consent form. Neither the regulation nor the preamble indicates when a consent form would be required.

Second, we question the reasonableness and practicality of requiring the form to be signed by the patients. In some settings, the patient may not be able to sign the form prior to treatment. For example, patients entering an emergency room may not be able to sign the consent form prior to any treatment provided by the nurse. In addition, it is doubtful that a hospital or doctor's office would hire a nurse that would be required to have patients sign an informed consent form prior to treatment.

If the Board determines a nurse with a previous sexual misconduct violation is fit to resume practice, we question the need for this provision. Therefore, we recommend that the Board reconsider the need for this provision in Sections 21.18a and 21.148a or explain how it can be reasonably implemented.